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BEFORE THE ARIZONA CORPORATION COMMISSION
Arizona Corporation Commission

COMMISSIONERS**DOCKETED**

JUN 29 2006

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

DOCKETED BY

RB

IN THE MATTER OF

PAC-WEST TELECOMM, INC.,

Complainant,

vs.

QWEST CORPORATION,

Respondent.

DOCKET NO. T-01051B-05-0495

DOCKET NO. T-03693A-05-0495

DECISION NO. 68820OPINION AND ORDER

DATE OF HEARING:

October 24, 2005 (oral argument only)

PLACE OF HEARING:

Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE:

Jane Rodda¹

APPEARANCES:

Joan S. Burke, OSBORN MALEDON, on behalf
of Pac-West Telecomm; andNorman G. Curtright, Corporate Counsel, on
behalf of Qwest Corporation.**BY THE COMMISSION:**

On July 13, 2005, Pac-West Telecomm, Inc. ("Pac-West") filed with the Arizona Corporation Commission ("Commission") a Formal Complaint Regarding Enforcement of an Interconnection Agreement against Qwest Corporation ("Qwest") alleging that Qwest has failed to comply with certain terms of the parties' interconnection agreement.

On July 15, 2005, Qwest was notified by the Commission's Docket Control of the formal complaint docketed by Pac-West.

On August 16, 2005, Pac-West and Qwest filed a Joint Stipulation for Extension to File Answer and for Briefing Schedule with a suggested briefing schedule.

¹ Administrative Law Judge Jane Rodda conducted the hearing in this proceeding and Administrative Law Judge Amy Bjelland drafted the Recommended Opinion and Order.

1 On August 22, 2005, Qwest filed its Answer to Pac-West's Complaint to Enforce its
2 Interconnection Agreement and Counterclaims.

3 On September 13, 2005, a Procedural Order was issued in this docket setting forth a briefing
4 schedule and a time for oral argument.

5 On September 14, 2005, Pac-West and Qwest each filed a simultaneous Opening Brief in this
6 docket.

7 On October 5, 2005, the parties filed a Joint Stipulation Regarding Briefing Schedule
8 requesting an extension of time for filing simultaneous response briefs.

9 On October 14, 2005, a Procedural Order was issued in this docket extending the deadline for
10 filing response briefs and retaining the date for oral argument.

11 On October 19, 2005, the parties each filed a simultaneous Response Brief in this docket.

12 A hearing for the purpose of oral argument convened on October 24, 2005, before a duly
13 authorized Administrative Law Judge of the Commission. Each party appeared with counsel and
14 agreed that a recommended order should be issued based on the legal issues raised and argued in the
15 docket and at oral argument. At the conclusion of the hearing, the matter was taken under
16 advisement pending issuance of a recommended opinion and order.

17 On December 7, 2005, Qwest filed a Notice of Filing Supplemental Authority.

18 On December 20, 2005, Qwest filed a Notice of Second Filing of Supplemental Authority.

19 On January 9, 2006, Pac-West filed a Response to Qwest's Supplemental Citations of
20 Authority.

21 On January 17, 2006, Qwest filed a Reply to Pac-West's Response to Qwest's Supplemental
22 Citations of Authority.

23 On January 23, 2006, Qwest filed its Notice of Third Filing of Supplemental Authority.

24 On February 1, 2006, Qwest filed its Notice of Fourth Filing of Supplemental Authority.

25 On February 3, 2006, Qwest filed its Notice of Fifth Filing of Supplemental Authority.

26 On February 13, 2006, Pac-West filed its Notice of Filing of Supplemental Authority.

27 On February 16, 2006, Fennemore Craig, attorneys for Qwest, filed a Notice of Withdrawal,
28 stating that Qwest has been advised of and consented to the withdrawal, and that pleadings in the

1 matter previously sent to Fennemore Craig should be directed to Norman Curtright. Substitution of
2 counsel was approved by procedural order on February 23, 2006.

3 On March 10, 2006, Pac-West filed its Second Citation of Supplemental Authority.

4 On March 28, 2006, Qwest filed its Notice of Sixth Filing of Supplemental Authority.

5 On April 5, 2006, Pac-West filed its Third Citation of Supplemental Authority.

6 On April 12, 2006, Qwest filed its Notice of Seventh Filing of Supplemental Authorities.

7 On April 13, 2006, a Recommended Opinion and Order was issued.

8 On April 20, 2006, Qwest filed a Motion for an Order Suspending the Recommended Opinion
9 and Order, and for Additional Briefing, with Request for Expedited Consideration.

10 On April 21, 2006, Pac-West filed a Response to Qwest's Motion.

11 On April 24, 2006, Qwest filed Exceptions to the Administrative Law Judge's Recommended
12 Opinion and Order. On this day Staff filed a Motion for Clarification of the Recommended Opinion
13 and Order. Pac-West responded to Staff's Motion on May 16, 2006.

14 On April 25, 2006, by procedural order, the parties were ordered to provide supplemental
15 legal briefing regarding *Global NAPs v. Verizon New England*, 2006 WL 924035 (1st Cir., April 11,
16 2006).

17 On May 10, 2006, the parties filed supplemental briefs.

18 On May 16, 2006, Qwest filed a Reply to Supplemental Brief of Pac-West Telecom.

19 On May 17, 2006, Level 3 Communications filed Comments Regarding the *Global NAPs*
20 Decision in this docket.

21 On May 22, 2006, Qwest filed a Motion to Strike Level 3's Comments.

22 On May 30, 2006, a letter from Pac-West's President and CEO, Hank Carabelli, was
23 docketed.

24 On June 2, 2006, a letter from Qwest's State President, Patrick J. Quinn, was docketed.

25 On June 15, 2006, a procedural order was issued granting Qwest's motion to strike Level 3's
26 comments in this docket.

27 * * * * *

28 Having considered the entire record herein and being fully advised in the premises, the

Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. Pac-West is a public service corporation and competitive local exchange company ("CLEC") that is certified to provide competitive telecommunications services in Arizona. Pac-West is authorized to provide switched and non-switched local exchange and long distance service in Arizona.

2. Qwest is an incumbent local exchange company ("ILEC"), as defined in 47 U.S.C. § 251(h), that provides local exchange and other telecommunications services throughout Arizona.

3. Pac-West and Qwest are parties to a Local Interconnection Agreement ("Interconnection Agreement" or "ICA"), approved by the Commission in Decision No. 62137 (December 14, 1999).

4. On April 27, 2001, the FCC released its Order on Remand and Report and Order *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, FCC 01-131 ("ISP Remand Order"). The ISP Remand Order held that, through §251(g) of the Telecommunications Act of 1996 (the "Act"), Congress intended to exclude ISP-bound traffic from the reach of §251(b)(5). ISP Remand Order ¶1. Thus, the FCC found that ISP-bound traffic is not subject to reciprocal compensation under § 251(b)(5). *Id.* ¶35. The FCC reaffirmed that ISP traffic is predominantly interstate access traffic subject to Section 201 of the Act and on an interim basis established rates for the exchange of such traffic, as well as set growth caps.

5. On May 24, 2002, Pac-West and Qwest entered into an amendment ("ISP Amendment") to their Interconnection Agreement, which was filed with the Commission and became effective by operation of law pursuant to § 252(e)(4) of the Act on May 19, 2003. The ISP Amendment provides that each party presumes that traffic delivered to the other party that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound. The parties agree that Pac-West terminates more calls for Qwest than Qwest terminates for Pac-West.

6. Sections 1.4 and 3.1 of the ISP Amendment provide that " 'ISP Bound' [traffic] is as described by the FCC in [the ISP Remand Order]," and that "Qwest elects to exchange ISP-bound

1 traffic at the FCC ordered rates pursuant to the [ISP Remand Order].” Section 5 of the ISP
 2 Amendment provides “the reciprocal compensation rate elected for (§251(b)(5)) traffic is the rate
 3 applied to ISP traffic.” The ISP Amendment also provided for a cap on minutes for which
 4 compensation is required for the years 2001, 2002, and 2003.

5 7. Due to a dispute regarding whether Qwest was obligated to compensate Pac-West for
 6 minutes over the growth caps after December 31, 2003, Pac-West and Qwest entered into private
 7 arbitration as provided for in the dispute resolution provision of their ICA. While the Pac-
 8 West/Qwest arbitration was pending, the FCC issued its Core Order.²

9 8. In an arbitration decision dated December 2, 2004, the Pac-West/Qwest arbitrator
 10 found that the ISP Remand Order discontinued the minutes cap after December 31, 2003. The Pac-
 11 West/Qwest arbitrator further found that, rather than changing the law established by the ISP Remand
 12 Order, the Core Order clarified the FCC’s intent to discontinue the minutes cap after 2003. Based on
 13 these findings, the Pac-West/Qwest arbitrator ordered that Pac-West was entitled to compensation for
 14 all ISP-bound traffic, without application of the growth caps, beginning on January 1, 2004.

15 9. Subsequent to the Pac-West/Qwest arbitration decision, Qwest notified Pac-West on
 16 December 29, 2004, that it would withhold reciprocal compensation for Virtual NXX (“VNXX”)
 17 traffic retroactive to the beginning of 2004. Pac-West offers VNXX service by assigning an NPA-
 18 NXX to an ISP customer physically located outside the rate center to which the NPA-NXX is
 19 assigned. The North American Numbering Plan provides for telephone numbers consisting of a three
 20 digit area code (Number Plan Area or “NPA”), a three digit prefix (“NXX”) and a four digit line
 21 number. As the Commission noted in Decision No. 66888 (April 6, 2004) (“AT&T Arbitration”):

22 NXX calls are assigned to particular central offices or rate centers within
 23 the state and are associated with specific geographic areas or exchanges.
 24 The definition is important for determining whether a call will be routed
 25 and rated as a local call, and subject to reciprocal compensation, or as a
 26 toll call subject to access charges....Qwest offers an FX service, under
 27 which for a monthly fee, Qwest provides customers in one rate center with
 a NPA-NXX assigned to another rate center, so that calls can be placed to
 and from the FX subscriber to and from customers in the foreign rate

28 ² *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from application of the ISP Remand Order*, WC Docket 03-171, FCC Release No. 04-241 (October 18, 2004).

center without incurring toll charges....Both FX service and VNXX services have the effect of expanding the local calling area for the customer.

AT&T Arbitration, pp. 7-8.

Reciprocal Compensation Under the ISP Amendment

Pac-West Position

10. Pac-West argues that Qwest breached its obligation under the ICA and ISP Amendment by refusing to compensate Pac-West for all ISP-bound traffic, including VNXX traffic originated by Qwest customers and terminated by Pac-West via Pac-West's VNXX service. Pac-West alleges that Qwest has withheld \$443,784.34 in compensation owed Pac-West for local exchange traffic terminated between January 1, 2004 and May 31, 2005.

11. Pac-West states that, in a practical sense, VNXX is indistinguishable from FX service and that therefore it is eligible for reciprocal compensation under the ISP Amendment. Pac-West further contends that, pursuant to *WorldCom, Inc. v. FCC*, 288 F. 3d 429 (U.S.App.D.C. 2002), ISP-bound traffic is not §251(g) traffic, or toll traffic, and therefore all ISP-bound traffic, including VNXX, is subject to reciprocal compensation pursuant to §251(b)(5).

12. Pac-West distinguishes the AT&T Arbitration, which excluded VNXX traffic from the definition of "Exchange Service" for an ICA between AT&T and Qwest, from the instant matter in three ways. First, the AT&T Arbitration decided prospective language for an ICA; second, the parties in that matter disputed and sought clarification for the term "Exchange Service" with regard to VNXX traffic and not to intercarrier compensation; and third, the Decision indicated the Commission's reluctance to decide in that matter "a future dispute concerning AT&T's VNXX service which may or may not arise under that provision." AT&T Arbitration at 13.

13. Pac-West requests that the Commission order Qwest to comply with the ICA with regard to the reciprocal compensation allegedly owed Pac-West for the transport and termination of all local traffic, including ISP-bound traffic and all VNXX traffic originated by Qwest. Pac-West requests that Qwest be ordered to make the payment owed to Pac-West, as well as interest for all overdue payments at the interest rate specified in the ICA.

14. In its Supplemental Brief, Pac-West addressed the impact of the *Global NAPs* decision

1 (2006 WL 924035 (1st Cir., April 11, 2006)) on the Recommended Opinion and Order. Pac-West
2 argued that *Global NAPs* does not affect the Recommended Opinion and Order because its holding
3 deals solely with whether the ISP Remand Order preempted state authority to impose access charges
4 for interexchange VNXX ISP-bound traffic. In addition to discussing the merits of *Global NAPs* and
5 whether it is relevant to our consideration of the matters in this docket, Pac-West pointed out that the
6 decision is not binding in Arizona, which is within the jurisdiction of the Ninth Circuit Court of
7 Appeals.

8 **Qwest's Position**

9 15. Qwest argues that it has not breached its obligation under the ICA and ISP
10 Amendment because VNXX traffic is not included in ISP-bound traffic for purposes of reciprocal
11 compensation. Qwest states that routing ISP-bound calls to a server that is not physically located in
12 the same local calling area ("LCA") is contrary to the regulatory scheme set forth in the ISP Remand
13 Order, as well as contrary to well-established telecommunications jurisprudence. Qwest contends
14 that VNXX traffic is not local exchange traffic and is therefore not eligible for reciprocal
15 compensation under the ICA and ISP Amendment. Qwest denies Pac-West's allegation regarding the
16 amount of money at issue and states that the maximum amount owed for the period from January 1,
17 2004 through May 31, 2005 is \$436,854.34.

18 16. Qwest states that VNXX traffic is distinguishable from FX service because FX
19 customers must purchase a local connection, pay for transport from the central office to their location,
20 and because of the extreme disparity in the volume of traffic. Qwest's Opening Brief, pp. 30-31.
21 Qwest specifies that VNXX traffic is not local traffic, and cites the Enhanced Service Provider
22 ("ESP") Exemption to support its contention. Qwest argues that the ESP Exemption was a policy
23 decision made by the FCC before the Act, wherein ESPs, or providers of communication that
24 modifies content, were authorized to connect their points of presence through local service tariffs,
25 even though the services provided were interstate in nature. Qwest states that based on the Act,
26 "[t]he FCC determined that ISPs, the heirs to the old "enhanced service provider" designation, were
27 entitled to the same treatment [as ESPs] for compensation purposes. Thus, when an ISP is served by a
28 CLEC, the same analysis applies under Section 251(g) of the Act." Qwest Answer, ¶21.

1 17. Qwest provided numerous supplements in this docket which included decisions from
2 other states purporting to support its argument against inclusion of VNXX within the definition of
3 ISP-bound traffic and cites the AT&T Arbitration in arguing that VNXX does not fall under the
4 definition of local traffic. In that matter, we adopted Qwest's proposed definition of "Exchange
5 Service", which did not specifically include VNXX traffic.

6 18. Qwest requests that the Commission deny all relief requested by Pac-West in its
7 Complaint.

8 19. In its Supplemental Brief, Qwest addressed the impact of *Global NAPs* on the
9 Recommended Opinion and Order. Qwest argued that *Global NAPs* requires reversal of the
10 Recommended Opinion and Order and quoted extensively from the *Global NAPs* decision as well as
11 the Amicus Brief filed by the FCC in that case. Qwest argued that the *Global NAPs* decision
12 "requires (1) that the term 'ISP-bound traffic' must be read in context and (2), when read in the
13 proper context, that the term 'ISP-bound traffic' refers only to local ISP traffic." Qwest
14 Corporation's Supplemental Brief, p. 11.

15 **Resolution**

16 20. The crux of the dispute is whether VNXX ISP-bound traffic is eligible for reciprocal
17 compensation under the ICA, the ISP Amendment and the ISP Remand Order. The ICA and its
18 amendments only authorize certain categories of traffic (e.g., Extended Area Service ("EAS")/Local
19 Traffic, Transit Traffic, Switched Access Traffic, Ancillary Traffic). The ICA and ISP Amendment
20 make no reference to VNXX. The precise classification of VNXX traffic remains unsettled. Current
21 jurisprudence at the federal level is inconclusive, and state jurisprudence is conflicting.

22 21. We agree with Qwest that FX and VNXX services are distinct. However, this
23 difference does not mean that VNXX traffic is ineligible to receive reciprocal compensation pursuant
24 to the ICA and ISP Amendment.

25 22. The *WorldCom* court reviewed the FCC's ISP Remand Order and explicitly rejected
26 the proposition that §251(g) carved out ISP-bound traffic from §251(b)(5) traffic, however the Court
27 did not vacate the Order as it found that the FCC could have arrived at the same result under different
28 reasoning. We cannot say that the ISP Remand Order is limited to ISPs with a server located in the

1 same local calling area as its customers. Nor do we believe that the ESP Exemption relied upon by
2 Qwest precludes the use of VNXX arrangements.

3 23. The *Global NAPs* case arose from an arbitration decision issued by the Massachusetts
4 Department of Telecommunications and Energy (“DTE”), which determined that Global NAPs, the
5 CLEC in that case, was required to pay Verizon, the ILEC in that case, access charges for VNXX
6 traffic, including for non-local ISP-bound traffic. It is helpful to note the *Global NAPs* court’s
7 succinct description of the intercarrier compensation debate:

8 The treatment of intercarrier compensation for ISP-bound traffic has been
9 a matter of considerable debate in recent years. Calls to ISPs tend to be
10 long, and generally go exclusively from the ISP customer to the ISP. This
11 has created opportunities for regulatory arbitrage. For example, in the
12 context of reciprocal compensation, since reciprocal compensation flows
13 from the LEC whose customer makes the phone call to the LEC whose
customer receives the phone call, an [sic] LEC with a high proportion of
ISP customers – as Global NAPs has – stands to gain a windfall in a
reciprocal compensation scheme which includes traffic to an ISP.

14 *Global NAPs* at 11³ (citations omitted).

15 24. Global NAPs contended that the ISP Remand Order had preempted the DTE’s
16 authority to regulate intercarrier compensation for all ISP-bound traffic. Verizon argued that VNXX
17 allowed Global NAPs to engage in regulatory arbitrage. The DTE’s decision classified VNXX calls
18 according to the geographic end points of the call, and ordered the parties to work together to
19 determine geographic end points of VNXX calls to facilitate imposition of access charges. Global
20 NAPs challenged the imposition of these access charges on VNXX ISP-bound calls.

21 25. In its analysis of the issue, the *Global NAPs* court referred to the FCC’s brief as
22 “helpful”, saying

23 that “[i]n some respects, the ISP Remand Order appears to address all calls
24 placed to ISPs” but also that “the administrative history that led up to the
25 ISP Remand Order indicates that in addressing compensation, the [FCC]
26 was focused on calls between dial-up users and ISPs in a single local
27 calling area.” Thus [the FCC Amicus Brief] concludes that the ISP
Remand Order “*can be read to support the interpretation set forth by
either party in this dispute.*”

28 ³ For ease of reference, *Global NAPs* citations reflect the pagination used in the copy appended to Qwest’s Notice of
Seventh Filing of Supplemental Authority.

1 The FCC further notes that “in establishing the new compensation scheme
2 for ISP-bound calls, the [FCC] was considering only calls placed to ISPs
3 located in the same local calling area as the caller.” According to the
4 FCC, “[t]he [FCC] itself has not addressed application of the ISP Remand
5 Order to ISP-bound calls outside a local calling area or decided the
6 implications of using VNXX numbers for intercarrier compensation more
7 generally.”

8 *Id.* at 31-32 (quoting the FCC Amicus Brief) (emphasis added). After careful analysis of the *Global*
9 *NAPs* decision and the briefs of the parties, we find that the *Global NAPs* court and the FCC’s
10 Amicus Brief make more evident the fact that the law remains unsettled, in contrast to Qwest’s
11 assertion that these two documents affirm its position, alone. Reasonable minds may differ on the
12 issue of what exactly the FCC meant with its ISP Remand Order. Ultimately, the *Global NAPs* court
13 held that the ISP Remand Order did not preempt state authority to regulate intercarrier compensation
14 for all ISP-bound traffic, but, as Pac-West has pointed out in its Supplemental Brief, this is not
15 dispositive to the resolution of this matter.

16 26. The ISP Amendment provides in Section 2 that “Pursuant to the election in Section 5
17 of this Amendment, the Parties agree to exchange all EAS/Local (§251(b)(5)) traffic at the state
18 ordered reciprocal compensation rate.” Section 5 provides “The reciprocal compensation rate elected
19 for (§251(b)(5)) traffic is...[t]he rate applied to ISP traffic.” The plain language of the ISP
20 Amendment provides for reciprocal compensation for all ISP-bound traffic. Because it does not
21 exclude VNXX ISP-bound traffic, we find that such traffic should be subject to reciprocal
22 compensation under the terms of the ICA and ISP Amendment.

23 27. The AT&T Arbitration prospectively dealt with the establishment of language to be
24 included in an ICA between the parties, specifically with the definition of “Exchange Service”, rather
25 than how to deal with intercarrier compensation. Most importantly, we acknowledged in that
26 Decision our unwillingness to determine a matter of such gravity without broad industry participation
27 and the participation of Staff. In this matter, again, we are disinclined to make a sweeping
28 pronouncement regarding the appropriateness of VNXX as it relates to intercarrier compensation.
We base our decision in this matter on the plain language of the specific contract terms.

29 28. For the foregoing reasons, we find that by withholding reciprocal compensation for

1 VNXX ISP-bound traffic, Qwest has breached the terms of the ICA and ISP Amendment.

2 29. VNXX allows carriers to effectively extend the local calling areas established by the
3 Commission. It is a departure from the historic means of routing and rating calls and has broad
4 implications for intercarrier compensation. Because the issue of VNXX has now come before the
5 Commission more than once, and we anticipate that it will continue to be an issue in the future, we
6 will order Staff to open a generic docket to investigate and make recommendations in the form of a
7 Staff Recommendation to the Commission regarding VNXX. Issues to be addressed by Staff should
8 include what rates are applicable on an ongoing basis; whether VNXX results in misassigned local
9 telephone numbers; and whether VNXX results in misused telephone numbering resources. Our
10 finding in the matter before us is premised on the language of the ICA and ISP Amendment and the
11 holding in the ISP Remand Order, and makes no findings concerning the appropriateness of VNXX
12 arrangements on a going-forward basis.

13 **Course of Dealing/Estoppel, Res Judicata, Discrimination**

14 30. Pac-West raised claims that the doctrines of "course of dealing"/estoppel and res
15 judicata preclude Qwest from raising objections to the use of VNXX, and that Qwest's opposition to
16 assigning phone numbers to allow VNXX arrangements is discriminatory. Given our resolution of
17 Pac-West's claim based on the plain meaning of the ICA and ISP Amendment, we do not reach these
18 issues.

19 **Qwest's Counterclaims**

20 **Qwest's Position**

21 31. Qwest made several counterclaims based on allegations that Pac-West violated
22 federal and state law, as well as the ICA.

23 32. Qwest contends that Pac-West has misassigned local telephone numbers and
24 NPA/NXXs in local calling areas other than the local calling area where its customer's ISP server is
25 physically located, misused telephone numbering resources and subsequently attempted to bill Qwest
26 the ISP Remand Order rate for VNXX traffic, all in violation of federal law. Qwest Answer ¶60.
27 Qwest asks the Commission to order Pac-West to cease assigning NPA/NXXs in local calling areas
28 other than the local calling area where its customer's ISP servicer is physically located, and cease

1 charging Qwest for such traffic, and further to require Pac-West to properly assign telephone
2 numbers based on the physical location of its end-user or ISP customer. *Id.*

3 33. Qwest contends that Pac-West has knowingly misassigned local telephone numbers to
4 ISP servers that are physically located outside of the local area to which the telephone number is
5 assigned in violation of Section 2.1.4.6.8 of Attachment 5 to the ICA. Qwest Answer ¶66. Section
6 2.1.4.6.8 of Attachment 5 to the ICA provides that “[e]ach Party is responsible for administering
7 NXX codes assigned to it...Each party shall use the [Local Exchange Routing Guide (“LERG”)]
8 published by Bellcore or its successor for obtaining routing information and shall provide all required
9 information to Bellcore for maintaining the LERG in a timely manner.”

10 34. Qwest argues that Pac-West is violating the ICA by attempting to obligate Qwest to
11 send non-local ISP traffic over LIS trunks because the Single Point of Presence (“SPOP”)
12 Amendment⁴ between the parties authorizes them to exchange only certain categories of traffic over
13 LIS trunks. Qwest Answer ¶70. Qwest contends that VNXX traffic is not within one of these
14 authorized categories. *Id.*

15 **Pac-West’s Position**

16 35. Pac-West argues that there is no law that prohibits a carrier from assigning a telephone
17 number associated with one local calling area to a customer who is physically located in a different
18 local calling area, and states that if this were so, Qwest itself would be in violation. Pac-West
19 Opening Brief ¶¶ 1-2. Pac-West further made an “unclean hands” argument that Qwest seeks
20 compensation from Pac-West for calls made to customers using Qwest’s FX service and features,
21 including ISPs. *Id.* Pac-West argues that any alleged federal violation is within the exclusive
22 jurisdiction of the FCC and not the Commission. *Id.* Pac-West further argues that the appropriate
23 venues to raise the issue of how a carrier assigns telephone numbers to its customers would be with
24 the North American Numbering Council, the North American Numbering Plan Administrator, or
25 another body with responsibility for national numbering issues. *Id.*

26 36. Pac-West argues that it has not violated Section 2.1.4.6 of Attachment 5 of the ICA.

27
28 ⁴ Pac-West and Qwest entered into the SPOP Amendment in 2001. The amendment was approved by Decision No. 63736 (June 6, 2001).

Pac-West states that Section 2.1.4.6 cannot reasonably be construed to create an independent contract obligation with respect to how a party obtains or uses telephone numbers. Pac-West Opening Brief ¶4. Even if there were such a contractual duty (which Pac-West asserts there is not), Pac-West states that it has not violated such obligation. *Id.* Pac-West quotes Section 2.14 of the Central Office Code (NXX) Assignment Guidelines (“COCAG”), which states “from a wireline perspective that [central office] codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer’s premise physically located in the same rate center that the [central office] codes/blocks are assigned. Exceptions exist, for example tariffed services such as foreign exchange service.”

37. Pac-West contends that FX ISP-bound traffic is included within the definition of EAS/Local Traffic, and is covered by the ISP Amendment to the ICA, and therefore Pac-West is not improperly routing traffic over LIS trunks. Pac-West Opening Brief ¶4. The ICA defined toll traffic as “traffic that originates in one Rate Center and terminates in another Rate Center with the exception of traffic that is rated as EAS, and defines EAS as “intraLATA traffic treated as ‘local’ traffic between exchanges (rather than as ‘toll’ traffic) as established by the Commission and as reflected in the effective US West tariffs.”

Resolution

38. Our resolution of the dispute addresses Qwest’s counterclaims. The generic docket will determine whether VNXX is in the public interest.

CONCLUSIONS OF LAW

1. Pac-West and Qwest are public service corporations within the meaning of Article XV of the Arizona Constitution.

2. Pac-West and Qwest are telecommunications carriers within the meaning of 47 U.S.C. §§ 251 and 252.

3. The Commission has jurisdiction over Pac-West and Qwest and the subject matter of the Complaint pursuant to 47 U.S.C. §§ 251 and 252 and A.A.C. R14-3-106.

4. The Commission’s resolution of the issues pending herein is just and reasonable, meets the requirements of the Act and regulations prescribed by the FCC pursuant to the Act, and is in the public interest.

ORDER

IT IS THEREFORE ORDERED that Qwest Corporation shall compensate Pac-West Telecomm, Inc. for ISP-bound traffic consistent with this Decision.

IT IS FURTHER ORDERED that Pac-West Telecomm, Inc.'s claims of discriminatory application and res judicata shall be dismissed.

IT IS FURTHER ORDERED that Qwest Corporation's counterclaims of violations of federal and state law, violation of Section 2.1.4.6 of the Interconnection Agreement, and improper routing over Local Interconnection Service trunks shall be dismissed.

IT IS FURTHER ORDERED that Staff shall open a generic docket to investigate and make recommendations to the Commission concerning the use of Virtual NXX, including what rates are applicable on an ongoing basis; whether VNXX results in misassigned local telephone numbers; and whether VNXX results in misused telephone numbering resources.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

Jeffrey R. Hatch-Miller
CHAIRMAN

Commissioner Mundell voted "Aye"
But was unavailable for signature

COMMISSIONER

James S. Wilson
COMMISSIONER

COMMISSIONER

[Signature]
COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 21st day of June, 2006.

[Signature]
BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

AB:mj

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2 SERVICE LIST FOR:

PAC-WEST TELECOMM, INC. and QWEST
CORPORATION

3
4 DOCKET NO.:

T-01051B-05-0495 and T-03693A-05-0495

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